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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An Illinois jury, instructed with pattern jury instructions on murder and voluntary manslaughter, found Kevin Taylor guilty of murder on March 18, 1986. In *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit held that use of the twenty-year-old pattern instructions violated the fourteenth amendment's due process clause because the instructions permitted a jury to find murder without considering evidence to support voluntary manslaughter, a lesser offense, as provided by state law. In *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992), the decision below, the Seventh Circuit held that *Falconer v. Lane* did not announce a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), thereby permitting Taylor to take advantage of *Falconer*'s holding retroactively in this habeas corpus action.

This petition presents the following questions for review:

1. Did the Seventh Circuit err by holding that existing precedent "dictated" *Falconer*'s holding under *Teague v. Lane* even though (a) many earlier decisions from the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and federal district courts irreconcilably conflict with *Falconer* on the constitutionality of the pattern instructions, (b) *Falconer* radically extends criminal defendants' due process rights by effectively requiring correct jury instructions on affirmative defenses provided by state law, and (c) other circuit courts have expressly rejected the *Falconer* court's reasoning?

2. Did the Seventh Circuit err by considering this jury instruction error "inherently prejudicial"?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on January 21, 1992.

OPINIONS BELOW

The February 2, 1987, decision of the Illinois Appellate Court is unpublished. The March 31, 1989, decision of the Illinois Appellate Court is published at 181 Ill. App. 3d 538, 536 N.E.2d 1312 (4th Dist. 1989). The December 19, 1990, decision of the United States District Court for the Central District of Illinois is unpublished. The January 21, 1992, decision of the United States Court of Appeals

for the Seventh Circuit is reported at 954 F.2d 441 (7th Cir. 1992). All these decisions are reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on January 21, 1992. On April 14, 1992, Justice Stevens granted the Petitioner's motion for an extension of time to file this petition from April 20, 1992, to and including April 27, 1992. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue the fourteenth amendment's due process clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. The case also puts in issue 28 U.S.C. § 2254 (1988): "The Supreme Court, a Justice, thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

STATEMENT OF THE CASE

I. Taylor's Criminal Trial and Appeal.

An Illinois jury found Kevin Taylor guilty of murder and home invasion under Illinois law on March 18, 1986. The court sentenced Taylor to thirty-five years in prison. Taylor appealed to the Illinois Appellate Court, arguing that the pattern jury instructions used at his trial on murder and the lesser offense of voluntary manslaughter violated state law. The court affirmed, finding that he had waived this issue (App. 38). The Illinois Supreme Court denied Taylor's petition for leave to appeal.

II. Taylor's State Post-Conviction Hearing and Appeal.

Taylor then filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act, arguing that he was denied effective assistance of counsel in violation of the sixth amendment because his trial lawyer did not object to the instructions on murder and voluntary manslaughter. The state trial court denied his petition, so Taylor again appealed to the Illinois Appellate Court. After Taylor filed his appeal, the Illinois Supreme Court issued its opinion in *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), which appeared to invalidate the pattern murder and voluntary manslaughter instructions used at Taylor's trial on state law grounds.

The Illinois Appellate Court denied Taylor's petition for post-conviction relief. The court held that *Reddick* would have required reversal on direct review because *Reddick* invalidated the pattern jury instructions on state law grounds. The court held, however, that *Reddick* did not invalidate the instructions on constitutional grounds.

Because prisoners may only receive post-conviction relief in Illinois for constitutional error, the court affirmed (App. 41-42). The Illinois Supreme Court denied Taylor's petition for leave to appeal from this judgment on October 5, 1989.

III. Taylor's Federal Habeas Corpus Proceeding.

Taylor proceeded to federal court, filing a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois. The court denied Taylor's petition. Although the court noted that the Seventh Circuit's recent decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), held that *Reddick* errors did in fact violate the fourteenth amendment's due process clause, contrary to the Illinois Appellate Court's holding in Taylor's state post-conviction relief proceeding, the court held that *Reddick* constituted a "new rule" of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989) (App. 29-32). The court principally relied upon *People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990), in which the Illinois Supreme Court explicitly adopted the *Teague* retroactivity analysis for state post-conviction relief proceedings and held that *Reddick* announced a new constitutional rule under *Teague*.

The United States Court of Appeals for the Seventh Circuit reversed (App. 1-24). It noted that its previous decisions had cast doubt on why a *Reddick* error violated the federal due process clause. The court held, directly contrary to the Illinois Supreme Court's *Flowers* decision (without even citing it), that *Reddick* did not announce a constitutional rule at all. Rather, the Seventh Circuit found that its own decision in *Falconer* (as clarified by its decision in this case) first held that *Reddick* errors violated the due process clause. The court reasoned, therefore, that the appropriate *Teague* inquiry asks whether *Falconer*, not *Reddick*, announced a new rule. The court found that *Falconer* did not announce a new rule under *Teague* and applied it retroactively to Taylor's conviction. Finding the pattern instructions "inherently prejudicial," the court held that use of the instructions in Taylor's case was not harmless beyond a reasonable doubt.

Jerry D. Gilmore, Warden of Taylor's prison, seeks a writ of certiorari from this Court to review this judgment and opinion of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

The decision below has ominous national implications. In this habeas corpus action, the Seventh Circuit retroactively applied an earlier case that invalidated, on novel constitutional grounds, pattern murder jury instructions that state and federal courts had considered constitutional for twenty years. In doing so, the court severely limited the scope of *Teague v. Lane*, 489 U.S. 288 (1989), in which the Court held that a case announces a "new rule" when "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (plurality opinion). The Court should review this issue to reverse the Seventh Circuit's momentous decision below and to resolve a circuit split on the proper scope of the due process clause.

The lower court's harmless error decision also requires reversal because it fundamentally misapplies harmless error analysis. The Seventh Circuit called the pattern instructions "inherently prejudicial" despite a long line of

decisions from this Court holding that jury instruction error does not require per se reversal on habeas corpus review. *Taylor v. Gilmore*, 954 F.2d 441, 454 (7th Cir. 1992) (App. 23). If allowed to stand, the decision below effectively clears the way for hundreds of convicted murders to by-pass the harmless error standard for this jury instruction error. This Court should prevent such a calamity from occurring by reversing the Seventh Circuit's incorrect decision below.

I.

FALCONER v. LANE, 905 F.2d 1129 (7th Cir. 1990), RADICALLY AND UNPREDICTABLY EXTENDED CONSTITUTIONAL LAW BY GRANTING CRIMINAL DEFENDANTS A DUE PROCESS RIGHT TO CORRECT JURY INSTRUCTIONS ON AN AFFIRMATIVE DEFENSE.

In holding that *Falconer v. Lane* announced an old rule that applies retroactively, the Seventh Circuit dismissed rank confusion in the state and federal courts about why these twenty-year-old pattern jury instructions used at Taylor's trial might violate the constitution. Indeed, the Seventh Circuit frankly conceded below that the "precise nature" of the constitutional infirmity had not been "free from doubt" until its decision in this case, and that the Seventh Circuit itself had a "hand in creating this doubt" by its holding in earlier cases. 954 F.2d at 448 (App. 13). These facts alone establish that *Falconer* announced a new rule under *Teague v. Lane*. Moreover, even if *Falconer* correctly revealed a constitutional problem with these instructions, no decision of this Court "dictated" that result. To the contrary, *Falconer* oppugns a line of cases from this Court which establish that criminal defendants have no due process right to affirmative defense instructions required by state law. Furthermore, *Falconer* is patently inconsistent

with cases from other circuits that have relied on this same line of cases when faced with similar issues. *Falconer* established a starkly new rule of criminal procedure which the court should not have applied retroactively to Taylor's conviction.

A federal court generally cannot grant habeas corpus relief to a prisoner based on a "new rule" of criminal procedure announced by a court after the prisoner's conviction became final. *Teague v. Lane*, 489 U.S. at 301 (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). A decision announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Stringer v. Black*, 112 S. Ct. 1130, 1135 (1992). If "reasonable jurists may disagree" as to whether an earlier decision "dictates" a later one, then the later decision announced a "new rule" under *Teague*. *Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990). As the Court explained in *Butler v. McKellar*, 494 U.S. 407 (1990), "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.* at 414. Under these settled principles, the Seventh Circuit erred by holding that *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), announced an old rule that it could apply retroactively to Taylor's conviction.

A. The Pattern Jury Instructions at Issue.

Under the Illinois Criminal Code of 1961 (the "Code"), a person committed murder if he killed someone with an intent to kill or commit great bodily harm. Ill. Rev. Stat. ch. 38, ¶ 9-1 (1985). In another statutory section, the Code also provided for a lesser crime of voluntary manslaughter.

Ill. Rev. Stat. ch. 38, ¶9-2 (1985). A person committed voluntary manslaughter rather than murder if the evidence established the two elements of murder noted above as well as a "mitigating circumstance." *See People v. Reddick*, 123 Ill. 2d 184, 193-97, 526 N.E.2d 141, 144-45 (1988). The Code provided for two mitigating circumstances: (a) that the defendant killed while acting under sudden and intense passion resulting from serious provocation, or (b) that the defendant had an unreasonable belief at the time of the killing that he had to protect himself. Ill. Rev. Stat. ch. 38, ¶9-2.[1]

In *Reddick*, the Illinois Supreme Court held that the mitigating circumstances described in the Code were partial affirmative defenses to a murder charge. *Reddick*, 123 Ill. 2d at 195-96, 526 N.E.2d at 145-46. The court held that defendants have the burden of producing evidence to warrant the instruction on voluntary manslaughter, but once the defendant raised the issue, the State had the burden of disproving the existence of the mitigating circumstance beyond a reasonable doubt. *Id.*, 123 Ill. 2d at 197, 526 N.E.2d at 146. The pattern jury instructions on these crimes—first published in 1968 and likely used in hundreds of criminal trials—did not accurately reflect the burdens of proof that the *Reddick* court announced. Accordingly, the *Reddick* court invalidated them. *Id.*, 123 Ill. 2d at 197, 526 N.E.2d at 146. Taylor's jury was instructed with the same instructions invalidated on state law grounds in *Reddick*.

[1] If the defendant had a *reasonable* belief that he had to defend himself (*i.e.*, if he acted in self-defense), a separate section of the Code provided for full acquittal. Ill. Rev. Stat. ch. 38, ¶7-1 (1985).

B. State and Federal Courts Have Disagreed Radically on the Constitutionality of the Instructions Invalidated in *Reddick*.

Since *Reddick*, federal and state courts, including the Seventh Circuit itself as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the due process clause. Because disagreement among reasonable jurists requires a finding that a constitutional principle is "new" under *Teague*, *Falconer* announced a new rule. *Sawyer*, 110 S. Ct. at 2827.

Before the Seventh Circuit decided *Falconer*, many courts held that a *Reddick* error did not violate the due process clause. These courts typically reasoned that, if anything, a *Reddick* error deprived a defendant of an affirmative defense, and the due process clause does not guarantee defendants the right to receive an affirmative defense instruction. *See, e.g., People v. Bolden*, 181 Ill. App. 3d 481, 487-88, 536 N.E.2d 1308, 1311-12 (4th Dist.), *appeal denied*, 542 N.E.2d 116 (Ill. 1989); *People v. Taylor*, 181 Ill. App. 3d 538, 540, 536 N.E.2d 1312, 1313 (4th Dist.), 545 N.E.2d 127 (Ill. 1989); *United States ex rel. Fleming v. Gramley*, 735 F. Supp. 302, 305-08 (C.D. Ill. 1990), *rev'd sub nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991). *See also People v. McGee*, 110 Ill. App. 3d 766, 775, 443 N.E.2d 1057, 1063-64 (2d Dist. 1982) (affirming convictions on direct review after trials using the pattern instructions); *People v. Howard*, 139 Ill. App. 3d 755, 760-61, 487 N.E.2d 656, 660-61 (2d Dist. 1985) (same). As the *Bolden* court explained, "No United States Supreme Court case has held that due process is denied when an imperfect instruction is given in regard to an included offense." 181 Ill. App. 3d at 487, 536 N.E.2d at 1312.

Other courts, however, including the Seventh Circuit and the Illinois Supreme Court, disagreed with this reasoning. These courts held that the *Reddick* court reversed on constitutional rather than state law grounds even though the instructions related to an affirmative defense. *See, e.g., Falconer v. Lane*, 905 F.2d at 1134 & n.5; *People v. Flowers*, 138 Ill. 2d 218, 235-37, 561 N.E.2d 674, 680-81 (1990); *People v. Shields*, 143 Ill. 2d 435, 442-43, 575 N.E.2d 538, 542 (1991); *People v. Brooks*, 175 Ill. App. 3d 136, 142, 529 N.E.2d 732, 736 (1st Dist. 1988), *appeal denied*, 124 Ill. 2d 557, 535 N.E.2d 916 (1989). These courts either held or strongly suggested that *Reddick* itself announced a due process holding, because the *Reddick* court considered the jury instruction error to violate a defendant's alleged fundamental right to accurate jury instructions. As the *Falconer* court stated, "[a]lthough the *Reddick* Court itself did not use the magic words 'due process' as the petition did, the Court obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude." 905 F.2d at 1134. The court explicitly approved of various Illinois Appellate Court decisions, including *People v. Brooks*, which held that *Reddick* announced a constitutional rule because "[t]he right of an accused to have the State prove all the elements of his alleged crime is incontestably of constitutional dimension." *Brooks*, 175 Ill. App. 3d at 142, 529 N.E.2d at 736 (citation omitted). *See Falconer*, 905 F.2d at 1134 & n.5 (adopting *Brooks* and other Illinois Appellate Court decisions).

As the Seventh Circuit later recognized, however, "an ambiguity exist[ed] as to the precise nature of the due process violation." *United States ex rel. Fleming v. Huch*, 924 F.2d 679, 682 (7th Cir. 1991). In particular, earlier statements in the Seventh Circuit's decisions never clarified exactly why *Reddick* errors did not merely violate state law since, at most, they deprived a defendant of his state-law right to present an affirmative defense. *See Patterson v. New York*, 432 U.S. 197, 210 (1977) (state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"); *Engle v. Isaac*, 456 U.S. 107, 119-21 (1982) (jury instruction error could not be challenged on habeas review because it related to an affirmative defense, not an element of the crime); *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (states may shift burden of proving self-defense to accused in homicide case). *See infra* § I.C., pp. 14-18.

Only in the decision below did the Seventh Circuit finally clarify why it believed that using these instructions violated the constitution. The court held that constitutional error occurred because (a) a reasonable likelihood existed that the jury applied the challenged instruction in "an invalid manner," and (b) the jury might not have "weigh[ed] evidence that may have led to an acquittal on the charge of conviction." 954 F.2d at 452-53 (App. 21). This novel holding went far beyond the earlier, irreconcilable efforts to resolve this issue by the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court, and federal district courts in Illinois. Because many reasonable jurists had addressed this issue but had arrived at divergent results, the opinion below was not "dictated" by existing precedent, and was necessarily a new rule under *Teague*.

The decision below states that other courts had not "disagreed with the ruling . . . subsequently handed down in *Falconer*." 954 F.2d at 451 (App. 18). The court did not acknowledge, however, many of the opinions cited above. For example, the court did not even mention the contrary results

in *Bolden* or even in *Taylor*, Kevin Taylor's post-conviction proceeding that preceded this habeas corpus action. Moreover, the court did not consider the confusion appearing in its own decisions and in the Illinois Supreme Court's decisions as evidence that "reasonable jurists may disagree" over the proper resolution of this difficult issue. *Sawyer v. Smith*, 110 S. Ct. at 2827. The court should have considered these irreconcilable decisions and found that *Falconer* announced a new rule.

The court compared only three earlier decisions and believed that they did not suggest that *Falconer* announced a new rule. The court erred in this analysis. The court first discussed *United States ex rel. Fleming v. Gramley* (the district court's opinion reversed by *United States ex rel. Fleming v. Huch)*, stating that the court "never reached, even tangentially, the central issue decided in *Falconer*." 954 F.2d at 451 (App. 19). The court was wrong. The *Fleming* district court held that the jury instructions did not "so infect the entire trial that the resulting conviction violates due process." 735 F. Supp. at 308. *Falconer* held just the opposite. *See Falconer*, 905 F.2d at 1135-36 (finding that the instructions infected the entire trial sufficiently to violate due process); *Rose v. Lane*, 910 F.2d 400, 401-02 (7th Cir.), *cert. denied*, 111 S. Ct. 515 (1990) (*Falconer* held that "the instructions were gravely erroneous and denied the defendant due process of law").

The court also attempted to distinguish *People v. McGee* and *People v. Howard*, both Illinois Appellate Court decisions upholding convictions after trials in which the pattern instructions were used, stating that their holdings rest on state law "and hence are not evidence of a pre-*Falconer* difference of opinion." 954 F.2d at 452 (App. 19) (citing *Sawyer v. Smith*, 110 S. Ct. at 2829-31). This reasoning, however, turns *Sawyer's* holding on its head.

In *Sawyer*, the petitioner argued that a long line of state-law decisions in his favor indicated that the constitutional rule he was proposing was an old rule. 110 S. Ct. at 2829. The Court rejected that argument, noting that his reliance on state law for this purpose "misapprehends the function of federal habeas corpus. . . . Federal habeas corpus serves to ensure that state convictions comport with the *federal* law that was established at the time the petitioner's conviction became final." 110 S. Ct. at 2830 (citations omitted). The Court held that it would not rely on state law to find an old constitutional rule in that case.

Contrary to the Seventh Circuit's opinion below, the Court's reasoning in *Sawyer* strongly suggests that *Falconer* announced a new rule. When state courts affirm convictions, they hold, at least implicitly, that the "convictions comport with the federal law that was established at the time the . . . conviction became final." *Sawyer*, 110 S. Ct. at 2830. The *McGee* and *Howard* courts would have reached different results if the Seventh Circuit had decided *Falconer* before them. *McGee* and *Howard* strongly suggest, therefore, that those courts believed the instructions were constitutional. *Falconer's* contrary decision must be a new rule, because it invalidated reasonable judges' earlier understandings of what the due process clause required regarding these instructions.

In holding that *Falconer* did not constitute a new rule under *Teague*, the Seventh Circuit has effectively declared that earlier opinions of the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district court were products of unreasonable jurists. *Sawyer*, 110 S. Ct. at 2827; *Butler v. McKellar*, 494 U.S. 407, 415 (1990). This holding cannot stand. These earlier courts did not reach divergent opinions because the judges were "unreasonable"; to the contrary, the opinions differ

because the courts were simply grappling with how best to apply existing precedent, which does not squarely resolve the constitutional question presented by these pattern instructions. Accordingly, *Falconer* presented a quintessentially new rule under *Teague*. This Court should issue a writ of certiorari to correct the Seventh Circuit's error and to preclude the federal courts from applying *Falconer*'s novel holding to potentially hundreds of long-final murder convictions in Illinois.

C. *Falconer* Radically Extends Criminal Defendants' Due Process Rights by Effectively Requiring Correct Jury Instructions on Affirmative Defenses Provided by State Law.

The *Falconer* court held that use of these instructions violated Taylor's right to due process of law despite *Patterson v. New York*, 432 U.S. 197 (1977), *Engle v. Isaac*, 456 U.S. 107 (1982), and *Martin v. Ohio*, 480 U.S. 228 (1987), all of which strongly suggest that he had no such due process right. Indeed, two circuits have rejected arguments that the Seventh Circuit applied in this case specifically because of the *Patterson*-line of cases. *See infra* § I.D., pp. 18-20. Even if the Seventh Circuit correctly decided *Falconer*, therefore, *Falconer* announced a new rule because it went far beyond earlier pronouncements of this Court on the scope of a criminal defendant's due process rights to an affirmative defense jury instruction.

Since *Patterson v. New York*, this Court has held, apparently uniformly, that in noncapital cases the due process clause requires proof beyond a reasonable doubt of the elements of a charged offense, but affirmative defenses are matters of state law. In *Patterson*, for example, the Court held that a state could legitimately, under the due process clause, place the burden of proof of an affirmative

defense upon a defendant. 432 U.S. at 205-11. Similarly, in *Engle v. Isaac*, the Court held that jury instructions that violated state law by placing the burden of proof of an affirmative defense upon a defendant did not violate the due process clause. 456 U.S. at 119-21. Lastly, in *Martin v. Ohio*, the Court held that a state may place the burden of proof of an affirmative defense on a defendant even if evidence that supports the affirmative defense would negate one of the elements of the charged offense. 480 U.S. at 233-36.

Falconer and the opinion below contradict the rationale of these cases. If the due process clause allows states to convict defendants with jury instructions that misallocate the burden of proof on an affirmative defense (*Engle v. Isaac*, 456 U.S. at 119-21), then the due process clause should also allow states to convict defendants with instructions that effectively deprive a defendant of an affirmative defense. *Falconer* and the decision below announce holdings directly contrary to this reasoning. Even if *Falconer* is correct, therefore, *Engle*, *Patterson* and *Martin* dispel any possibility that existing precedent "dictated" the *Falconer* holding.

The lower court relied on *Connecticut v. Johnson*, 460 U.S. 73 (1983), to hold that "permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter . . . violates due process." 954 F.2d at 453 (App. 22). As the court itself recognized, however, *Johnson* involved instructions on an element of a crime, not an affirmative defense. *Id.* The court considered this distinction from *Johnson* "insignificant," however, stating:

> What ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless

> of whether the evidence related to an element of the crime or an affirmative defense. In a state that defines manslaughter and murder as separate crimes, and at a trial where a defendant is constitutionally entitled to voluntary manslaughter instructions, a homicide committed under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill.

Id. (App. 22-23). This passage misapplies the law for at least three reasons.

First, to the extent that the instructions might have prevented the jury from acquitting Taylor of murder even though he presented evidence of an affirmative defense, the instructions only violated state law. The due process clause does not place on a state the burden of proving the absence of an affirmative defense, even if the existence of the affirmative defense might negate an element of the charged crime. *Martin v. Ohio*, 480 U.S. at 233-36. It necessarily follows that a defendant has no due process right to have a jury consider evidence that is only relevant to an affirmative defense.

Second, the court cites no authority for the proposition that Taylor was "constitutionally entitled to voluntary manslaughter instructions." 954 F.2d at 453 (App. 23). This Court has apparently never held that criminal defendants have such a right in noncapital cases. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980) (noting that the Court has "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process").

Third, although the court correctly states that a homicide committed "under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill" (954 F.2d at 453 (App. 23)), the issue in the case was not whether the defendant committed murder; the issue

was whether the jury instructions, by impinging upon Taylor's affirmative defense case, violated the constitution. Whether the evidence established murder under state law is a fundamentally different question from whether the constitution required that the instructions permit the jury to consider that evidence.

The Seventh Circuit also justified its holding on another line of cases from this Court which control the scope of habeas review of improper jury instructions. The court below never acknowledges, however, that this Court has apparently never applied this second line of cases to instructions that effectively deprive a defendant of only an affirmative defense.

The due process clause requires a new trial when "an ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). In reviewing jury instructions, a collateral court must assess "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The Seventh Circuit purported to apply this rule in this case, but restated the *Boyde* test in a novel and expansive way. Rather than asking whether Taylor's jury was likely to have applied the instruction "that prevents its consideration of constitutionally relevant evidence," as the Court stated in *Boyde*, the court below inquired whether the jury was likely to have applied the instruction "in an invalid manner," by which it meant in a manner that deprived Taylor of an affirmative defense permitted by state law. 954 F.2d at 452-53 (App. 21).

This slight difference in wording makes the Seventh Circuit's holding radical indeed. A *Reddick* error prejudices

a defendant because the instructions effectively prevent a jury from considering, as required by state law, the lesser crime of voluntary manslaughter as an alternative to murder. *Falconer*, 905 F.2d at 1136. But, as this Court established in *Patterson* and later cases, defendants have no due process rights to jury instructions on affirmative defenses in noncapital cases. *Engle v. Isaac*, 456 U.S. at 119-21; *Patterson v. New York*, 432 U.S. at 210; *Martin v. Ohio*, 480 U.S. at 233. It may have been "invalid" under *state* law for the pattern instructions to prevent Taylor's jury from considering evidence of voluntary manslaughter; such evidence is plainly not, however, "constitutionally relevant evidence" under *Patterson*.

D. Other Circuit Courts Have Expressly Rejected the *Falconer* Court's Reasoning.

At least two circuits have properly rejected the reasoning contained in the lower court's restatement of the *Falconer* holding specifically because of *Patterson* and its progeny. This circuit split illustrates the national dilemma posed by the decision below. In at least two circuits, criminal defendants have no right to correct jury instructions relating to an affirmative defense in any circumstance because affirmative defenses are the subject of state law under *Patterson*. The Seventh Circuit declared below, however, that criminal defendants not only have such a right despite *Patterson*, but that the existence of this due process right was dictated by this Court's precedent. This Court should grant certiorari to correct the Seventh Circuit's error and resolve the split in the circuits over this fundamental rule of criminal procedure.

Both the Sixth and the Ninth Circuits have rejected the reasoning applied by the court below. In *Allen v. Redman*, 858 F.2d 1194 (6th Cir. 1988), for example, the

habeas petitioner argued that his state jury instruction on the affirmative defense of insanity was incorrect in that it permitted the jury to convict him of the charged crime without considering his sanity. He argued that the instruction completely "infected" the trial so as to deprive him of due process under *Cupp*. The court rejected his argument, holding that "the language from *Cupp*, stating that the 'resulting conviction violates due process,' brings the analysis . . . back to whether sanity is an element of the crimes involved." 858 F.2d at 1200. Because sanity was not an element of the charged crime, the *Cupp-Boyde* rule did not apply in the petitioner's case. *Id. See also Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987) (confusing jury instructions on an affirmative defense to murder could not violate due process).

Similarly, in *Walker v. Endell*, 850 F.2d 470 (9th Cir.), *cert. denied*, 488 U.S. 926 & 981 (1988), the petitioner argued that due process required correct instructions on "criminal recklessness." *Id.* at 475-76. Criminal recklessness only negated the defense of duress, however, which was not an element of the charged crime. *Id.* at 476. Accordingly, the court held that "the failure to give an instruction defining recklessness is at most an error of state law." *Id.*

Walker, *Wood* and *Allen* all reach the opposite conclusion of the court below, *i.e.*, that confusing or incorrect jury instructions that at most deprive a defendant of an affirmative defense can still violate the due process clause. Given this dispute among reasonable jurists as to the scope of due process limitations on incorrect affirmative defense jury instructions, *Falconer's* holding (as clarified in the decision below) constitutes a new rule under *Teague*.

This Court's grant of certiorari would allow it to resolve this circuit conflict over the scope of the due process clause.

II.

THE SEVENTH CIRCUIT ERRED BY HOLDING THAT USE OF THE PATTERN INSTRUCTIONS IS "INHERENTLY PREJUDICIAL."

The lower court held that use of the pattern instructions is "inherently prejudicial" to a criminal defendant, making it extremely difficult for a federal habeas corpus court ever to find harmless error. *Taylor*, 954 F.2d at 454 (App. 23-24). As this Court held in *Rose v. Clark*, 478 U.S. 570 (1986), and recently reaffirmed in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), however, jury instruction error is not inherently prejudicial. *Rose*, 478 U.S. at 579-82; *Fulminante*, 111 S. Ct. at 1263. Rather, a reviewing court must ask whether the evidence was dispositive enough for the court to declare, beyond a reasonable doubt, that the jury would have reached the same result with correct instructions. *See Rose*, 478 U.S. at 583-84; *Pope v. Illinois*, 481 U.S. 497, 502 (1987) (court must determine whether "it can be said beyond a reasonable doubt that the jury's verdict . . . was not affected by the erroneous instruction"). Because jury instructions cannot be inherently prejudicial under this Court's precedent, the Court should issue a writ of certiorari to reverse this holding of the lower court.

The Seventh Circuit indeed examined the record in its harmless error analysis as this Court's precedent requires, but its method virtually assures that courts will always find prejudicial error in *Reddick* cases. The court stated that the trial judge, "by granting Taylor's request to tender manslaughter instructions, apparently believed that

there was enough evidence in the record to support mitigation to manslaughter." 954 F.2d at 454 (App. 24). This statement egregiously misstates Illinois law.

At Taylor's trial, the judge had to tender the voluntary manslaughter instruction if even "very slight evidence" supported the charge. *People v. Williams*, 205 Ill. App. 3d 751, 765, 563 N.E.2d 762, 770 (1st Dist. 1989); *People v. Arnold*, 139 Ill. App. 3d 429, 434, 487 N.E.2d 997, 1000 (1st Dist. 1985); *People v. Garcia*, 169 Ill. App. 3d 618, 620, 523 N.E.2d 992, 994 (1st Dist.), *appeal denied*, 122 Ill. 2d 584, 530 N.E.2d 255 (1988). By the decision below, whenever only "very slight evidence" supports voluntary manslaughter, a *Reddick* error is not harmless beyond a reasonable doubt. But the existence of "very slight evidence" plainly does not preclude a jury from finding that the defendant committed murder rather than manslaughter. The Seventh Circuit's declared method of harmless error analysis for *Reddick* errors, therefore, presumes prejudice; it does not even address the only relevant question, *i.e.*, whether "it can be said beyond a reasonable doubt that the jury's verdict . . . was not affected by the erroneous instruction." *Pope*, 481 U.S. at 502.

The harmless error doctrine "preserve[s] the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *Fulminante*, 111 S. Ct. at 1264 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). The decision below thwarts this policy by summarily dismissing the very real chance that a jury would have found a defendant guilty of murder even though the law technically required a manslaughter instruction. The court should grant certiorari to reverse the Seventh Circuit's decision.

CONCLUSION

The Seventh Circuit's decision contravenes this Court's precedent, creates a circuit split on a fundamental rule of criminal procedure, and wrongly gives a colorable habeas corpus claim to potentially hundreds of convicted murderers. Moreover, it fundamentally misapplies the harmless error standard required by numerous decisions of this Court. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1148

KEVIN TAYLOR,

Petitioner-Appellant,

v.

JERRY D. GILMORE,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 90-C-1211—**Michael M. Mihm**, *Judge.*

ARGUED SEPTEMBER 13, 1991—DECIDED JANUARY 21, 1992

Before POSNER, FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Kevin Taylor admitted that he stabbed his ex-wife's live-in lover to death, but maintained that his crime was manslaughter. An Illinois jury disagreed—maybe—and declared him a murderer. In this petition for a writ of habeas corpus, Taylor argues that his conviction was invalid because the instructions given the jury were defective, precluding it from returning a voluntary manslaughter verdict when one may have been appropriate.

Taylor's appraisal of the jury instructions in his case is well taken. The Illinois Supreme Court held in *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988), that nearly identical instructions offended Illinois statutory law, and this

Court found in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), that they ran afoul of the federal due process clause. Illinois prudently concedes that the instructions given Taylor's jury were defective, and challenges the vitality of neither *Reddick* nor *Falconer*. It contends, however, that the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), deprive Taylor of the benefit of *Falconer* and *Reddick* because both cases announced "new rules" after his conviction became final and neither case falls within either of the two exceptions carved in *Teague*. The district court agreed and denied his petition for habeas corpus. 770 F. Supp. 445 (C.D. Ill. 1990). Because we find that *Falconer* is not a "new rule," and therefore that Taylor is entitled to its retroactive application, we reverse and grant the writ.

I.

A.

Prior to the killing a tense relationship had developed between Taylor and Scott Siniscalchi, the new romantic interest and housemate of his ex-wife Joyce. Katie Taylor, the young daughter of Joyce and Kevin, lived with Joyce and Siniscalchi, and the two men argued on occasion when Siniscalchi would bring Katie to Taylor's trailer home for parental visits. Taylor also claimed that Siniscalchi ridiculed and antagonized him when both men were working at a fair.

The bad blood reached a boiling point on September 14, 1985. At approximately 1 a.m., Taylor called Joyce—not an uncommon occurrence, as she often worked late hours—to arrange for visitation plans with Katie the following morning. The two spoke for a few moments, agreed that Taylor would pick Katie up at Joyce's home, and hung up. Taylor then realized that he had other plans that morning, and called Joyce back to make alternate arrangements. Siniscalchi answered the phone and refused to let Taylor speak with Joyce; he claimed that she was tired and needed sleep. Taylor then asked Siniscalchi if he would bring Katie to meet Taylor at the municipal pool that morning.

Siniscalchi refused, and (according to Taylor) said that he wasn't going to bring Katie anywhere to see Taylor. Finally, Taylor offered to pick Katie up at that moment, to which Siniscalchi replied (again, according to Taylor), "Well, suit yourself, but you're not going to get her." XIII Tr. at 70.

Agitated that Siniscalchi was trying to keep him from his daughter, Taylor quickly drove to Joyce's apartment building. Before leaving his car, Taylor grabbed a sheathed hunting knife and stuck it in the side of his sweatpants. Taylor testified that he heard Katie crying when he approached the door of Joyce's apartment. He beat on the door, and when nobody answered he kicked it open. Taylor then searched for Katie and found her sitting on the floor in the master bedroom, where Joyce and Siniscalchi were sitting up in bed. Taylor testified that, when he reached to pick up Katie, Siniscalchi "started to roll out of bed and looked like he was reaching for something." *Id.* at 76. A fracas ensued between the three adults, and Taylor was thrown into a wall. While Siniscalchi was pulling his hair and shirt, Taylor grabbed the knife and stabbed Siniscalchi, who screamed, "[t]he knife is in me Joyce, the knife is in me." XII Tr. at 42. Siniscalchi died from his wounds, and Taylor was subsequently arrested.

B.

At the time of Taylor's trial, Illinois homicide law provided that murder had two elements. First, the defendant must have performed the acts that caused the death of the victim; second, in performing those acts, the defendant must have intended to kill or do great bodily harm to the victim, must have known that the acts would cause great bodily harm or death, must have known that the acts created a strong probability of death or great bodily harm, or must have been committing a forcible felony (in Taylor's case, home invasion). Ill. Rev. Stat., ch. 38, ¶ 9-1 (1985). Voluntary manslaughter had three elements. The first two were, for all relevant purposes, the same as both

elements of murder. The third was a mitigating mental state; the defendant must have acted either under a sudden and intense passion arising from a serious provocation, or under an unreasonable (but honest) belief that deadly force was justified to prevent his imminent death or great bodily harm. *Id.* ¶ 9-2. In essence, the third element worked as a partial affirmative defense to a charge of murder—partial in that a successful defense effected a murder acquittal but a manslaughter conviction.[1]

At trial Taylor did not deny that he committed the homicide (although he was less forthright with the police following his arrest). He instead maintained that he acted under a sudden and intense passion provoked by Siniscalchi and hence was guilty only of voluntary manslaughter. At the close of the evidence, the judge tendered to the jury the Illinois pattern murder instructions followed by the pattern voluntary manslaughter instructions. The manslaughter instructions placed upon Taylor the burden of proving that he possessed a mitigating mental state. In addition, the instructions did not direct the jury to consider Taylor's manslaughter defenses in the event it found both elements of murder. The jury returned a murder verdict, and the judge sentenced him to 35 years of imprisonment. (Taylor's conviction and concurrent 6-year sentence for home invasion is not at issue here.)

On direct appeal, Taylor challenged his conviction on the ground, among others, that the jury instructions improperly assigned him the burden of proof on the mitigation issue. The trial judge, he argued, should have required the prosecution to *disprove* beyond a reasonable doubt his "sudden and intense passion" defense. The Illinois appel-

[1] Pursuant to amendments to the Illinois Criminal Code effective July 1, 1987, the crime of "murder" is now "first degree murder," and "voluntary manslaughter" is now "second degree murder." *See* Ill. Ann. Stat. ch. 38, ¶¶ 9-1, 9-2 (Smith-Hurd 1991); *Fleming v. Huch*, 924 F.2d 679, 680 n.1 (7th Cir. 1991); *People v. Brown*, 578 N.E.2d 1168, 1172 (Ill. App. 1st Dist. 1991).

late court did not reach the merits of this claim, holding that Taylor had waived it by not raising it at trial. *People v. Taylor*, No. 4-86-0355 (4th Dist. Feb. 2, 1987) (unpublished order). The Illinois Supreme Court denied his petition for leave to appeal on June 4, 1987. Since Taylor did not file a petition for writ of certiorari with the United States Supreme Court, his conviction became final on that date.[2]

Taylor then sought post-conviction relief in the Illinois courts. The trial court dismissed his petition. Subsequently, the Illinois Supreme Court in *Reddick*, 526 N.E.2d at 145-46, invalidated jury instructions similar for all relevant purposes to those given at Taylor's trial; the Court held (endorsing the argument Taylor made on direct appeal) that, under Illinois law, the state bears the burden of disproving beyond a reasonable doubt issues that would mitigate a homicide from murder to voluntary manslaughter. With *Reddick* in hand, Taylor appealed the trial court's denial of post-conviction relief. The Illinois appellate court nonetheless affirmed, explaining that *Reddick* did not correct "constitutional error," the only grounds available to support state post-conviction relief when a defendant had waived a claim at trial. *People v. Taylor*, No. 4-88-0075 (4th Dist. Mar. 31, 1989) (unpublished order). The Illinois Supreme Court again denied his petition for leave to appeal.

His state remedies exhausted, Taylor filed a petition for a writ of habeas corpus in federal district court under 28 U.S.C. § 2254. Eleven days later, we held in *Falconer v.*

[2] Or, perhaps, 90 days later. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989), held that a defendant's conviction becomes final on the date the United States Supreme Court denies his petition for certiorari on direct review. For defendants, like Taylor, who do not seek certiorari in the Supreme Court, it is unclear whether finality occurs on the date the state Supreme Court rules (or denies review), or 90 days later when the period for seeking certiorari expires. In any event, the issue is moot here since both *Reddick* and *Falconer* were decided more than 90 days after June 4, 1987.

Lane, supra, that the jury instructions invalidated on state law grounds in *Reddick* also transgressed the federal due process clause. The district court in this case agreed that Taylor's jury instructions were invalid under both *Reddick* and *Falconer*. 770 F. Supp. at 446. However, it held that both cases, decided after Taylor's conviction became final, announced new rules that did not fall within either of the two exceptions carved by *Teague* and its progeny. *Id.* at 448. Since *Teague* deprives habeas petitioners of the retroactive benefit of new rules not falling within either exception, *see Saffle v. Parks*, 494 U.S. 484, 487-88 (1990), the court denied Taylor's petition. This appeal followed.

II.

The district court rested its decision upon an interpretation of law, not a determination of fact. Our review is therefore *de novo*. Because the process of distinguishing new rules from old under *Teague* is complicated and of somewhat novel application in this circuit,[3] we survey the terrain to structure our inquiry into whether *Reddick* and *Falconer* indeed announced new rules, or whether both simply applied established rules in a different factual context.

In *Teague*, the Supreme Court defined a "new rule" as one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original). The Court refined its definition in subsequent cases, holding that a decision announces a new

[3] To our knowledge, the only case deciding whether a given decision announced a new rule is *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990). There, we held that the portion of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), forbidding the prosecution's use of a defendant's post-*Miranda* warning silence to rebut his insanity defense did not announce a new rule, but rather was compelled by *Doyle v. Ohio*, 426 U.S. 610 (1976).

rule if it is contrary to earlier "reasonable, good-faith interpretations of existing precedents" by lower federal courts or state courts. *Butler v. McKellar*, 494 U.S. 407, 414 (1990). "[T]he fact that a court says that its decision was within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether [it] is a 'new rule' under *Teague*." *Id.* A case applies an old rule only if its holding is "compelled" by precedent. *Sawyer v. Smith*, 110 S. Ct. 2822, 2828 (1990). In contrast, a case puts forth a new rule if its outcome was "susceptible to debate among reasonable minds," or unless a contrary result would have been "an illogical or even a grudging application" of prior precedent. *Butler*, 494 U.S. at 415; *see also Sawyer*, 110 S. Ct. at 2828-31.

With these basic guidelines in mind, we can easily classify as a new rule any decision that explicitly overrules a prior case, *see Butler*, 494 U.S. at 412; *Penry v. Lynaugh*, 492 U.S. 302, 353 (1989) (Scalia, J., concurring and dissenting), significantly departs from precedent, or decides a question previously reserved. *See Teague*, 489 U.S. at 301 & n.1. Conversely, a decision clearly does not announce a new rule if it merely applies precedent, almost directly on point, to a closely analogous set of facts.

But, as the Court has recognized on occasion, the "new rule" rule is easier to recite than apply in most cases. *See id.* at 301; *Penry*, 492 U.S. at 314. It is often difficult to determine whether a case extends prior precedent, or merely applies it in a somewhat different factual context. The lines are fuzzy; in drawing them we remain keenly aware that terms such as "fact," "law," "precedent," and "reasonable" are pliable, and hence susceptible to contrary interpretations. *Compare Penry*, 492 U.S. at 314-19 (habeas petitioner not seeking new rule) *with id.* at 352-53 (Scalia, J., dissenting). Suffice it to say that discerning the domain of a given rule and marking the precise point at which its younger sibling, rather than it, applies is more an art than a science.

We discern from *Teague* and its progeny two criteria that offer guidance in distinguishing "old" from "new" rules in murky cases. The first criterion, explicitly employed in *Butler*, is whether any lower federal court or state court reached a different conclusion as to the precise legal issue subsequently resolved by a given decision. In *Butler*, the habeas petitioner argued that *Arizona v. Roberson*, 486 U.S. 675 (1988), did not announce a new rule because it merely applied the dictates of *Edwards v. Arizona*, 451 U.S. 477 (1981), in a different factual context. The Court disagreed; the fact that there had been a post-*Edwards* circuit split on the issue subsequently resolved in *Roberson* indicated that it was not compelled by precedent, and hence that it announced a new rule. *Butler*, 494 U.S. at 415. Prior state court decisions may be considered in this head count, *see id.* (alluding to split in state courts over issue decided in *Roberson*), unless they are based solely on state law. *See Sawyer*, 110 S. Ct. at 2829-31; *Carringer v. Lewis*, 948 F.2d 588, 596-97 (9th Cir. 1991).[4]

The fact that a given case departs from prior lower court or state court decisions on the same issue is good evidence that the case was "susceptible to debate among reasonable minds." But it is not dispositive. If a prior lower court or state court decision is not only incorrect,

[4] In a similar vein, *Sawyer v. Smith*, *supra*—which held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), was a new rule—hints that the presence of a written dissent in a case is evidence that the case announced a new rule. *Sawyer*, 110 S. Ct. at 2828 ("Certainly *Caldwell* was not seen as compelled by the three Justices . . . who found a 'lack of authority' in our Eighth Amendment precedents for the approach taken there.") (citation omitted). If the Court meant to make this relevant, *Sawyer* represents a break from *Penry*, which held, as a threshold matter, that the rule announced therein was not new despite the fact that four Justices dissented on the merits. *Penry*, 492 U.S. at 314-19. We need not resolve this dispute here since there were no written dissents in *Reddick*, *Falconer* or either of the decisions affirming *Falconer*. *See Fleming v. Huch*, *supra*; *Rose v. Lane*, 910 F.2d 400 (7th Cir. 1990).

but obviously so, it could hardly be said that the existence of that decision renders a subsequent corrective a new rule. Moreover, the absence of prior contrary decisions does not necessarily indicate that a later case was beyond dispute, and hence not a new rule.

The second criterion, amenable to less precise application than the first, concerns the generality of the precedent underlying the decision at issue. The more general a given set of precedent, the more latent ambiguity inherent in that precedent, and the less likely a subsequent decision is dictated by that precedent—and therefore the more likely it announces a new rule. Conversely, the more specific the given set of precedent, the less likely a decision announces a new rule—assuming, of course, that the precedent is specific in a manner that lends easy application to the decision at issue. As will become clear shortly, applying this criterion requires that one examine precedent, however specific, in light of the factual context in which it arose.

Sawyer presents a rather simple illustration of how levels of generality play into *Teague* new rule analysis. Petitioner there maintained that *Caldwell v. Mississippi*, 472 U.S. 320 (1985)—a case invalidating death sentences imposed by sentencing bodies led (incorrectly) to believe that the ultimate responsibility for sentencing lies elsewhere—was "dictated by the principle of reliability in capital sentencing" established in prior eighth amendment cases. *Sawyer*, 110 S. Ct. at 2828. The Court took exception to this reasoning, noting that *Teague* "would be meaningless if applied at [that] level of generality." *Id.* Simply stated, *Caldwell* was no more "compelled" by the precedent cited by petitioner than it was by the principle that the Eighth Amendment prohibits cruel and unusual punishment. Were it any other way, habeas petitioners could circumvent *Teague* by describing the precedent underlying the case whose benefit they seek at a high enough level of generality. More specificity is required.

Use of the generality criterion is implicit in other post-*Teague* cases. As noted above, *Butler* held that *Roberson*

followed, but was not dictated by, *Edwards*, and consequently was a new rule. *Edwards* provides that the fifth amendment bars police from reinitiating interrogation of a suspect in custody once the suspect has requested counsel, and excludes from evidence any confessions elicited during the second (post-request) interrogation. The second interrogation in *Edwards* focused upon the same crime as the first. *Roberson*, decided seven years later, held that the *Edwards* rule applies when the second interrogation focuses upon a different crime than the first. The Court's opinion in *Butler* suggests that *Roberson* was a new rule because (among other reasons) the dictate of *Edwards*—"police shall refrain from all further interrogation after a defendant asks for counsel"—was too general. Owing to the particular factual situation underlying *Edwards*, it was unclear whether a custodial defendant's request for counsel precludes subsequent questioning *only* on the subject of the original interrogation or on *all* subjects. To have "compelled" *Roberson* within the meaning of *Teague*, *Edwards* would have had to be more specific (e.g., "police shall refrain from all further interrogation after a defendant asks for counsel, whether or not the second interrogation involves the same crime than the first"). Or the separate interrogations in *Edwards* would have had to have focused upon different crimes. (Either possibility would have rendered *Roberson* superfluous.) In short, *Butler* deemed *Roberson* "new" because the general rule in *Edwards* had a latent ambiguity; it did not *specifically* forbid subsequent interrogation on matters unrelated to the first interrogation, and thus possibly was limited to resumption of the original line of questioning.

By way of contrast, consider the following hypothetical. Instead of *Edwards* and *Roberson* the Supreme Court decided two similar cases, *Jones* and *Smith*. *Jones* announced the same rule as *Edwards*, but arose in a case where the first interrogation involved a murder and the second, conducted after the defendant requested counsel, a vehicular homicide. *Smith* reaffirmed the *Jones* rule in a situation where the first interrogation focused on a murder and the

second on mail fraud. A habeas petitioner, whose conviction became final after *Jones* but prior to *Smith*, seeks the benefit of the two cases where his two crimes, also subject to sequential rounds of questioning interrupted with a request for counsel, were identical to those in *Smith*. The question arises whether *Smith* announced a new rule. If it did, the petitioner is denied relief; if it did not, he gets the benefit of *Smith* (and, it follows, *Jones*, for if *Smith* is not new, *Jones* applies with equal force).

The state, were it to make the case that *Smith* announced a new rule, would argue as follows. The rule in *Jones*—"police shall refrain from all further interrogation after a defendant asks for counsel"—is too general in light of the factual context in which it arose. *Jones*, in other words, contains a latent ambiguity because it is unclear whether its provisions apply only to cases where both interrogations involved homicides, or perhaps crimes of a similar type (e.g., two different burglaries). *Jones*, then, did not compel *Smith* because the second interrogation there involved a mail fraud scheme, a different type of crime than murder, the subject of the first interrogation.

This argument, however, cuts too finely. The purpose of *Jones* is to prevent reinterrogation once a defendant requests counsel, and the facts of the case clearly indicate that the rule applies regardless of whether the separate interrogations involve separate crimes. That the separate crimes were both homicides, or of the same general type, is of almost no relevance to the gist of *Jones*. (In contrast, one could plausibly—though, ultimately, incorrectly—maintain that the purpose of *Edwards*, in light of its facts, was to prevent renewal of interrogation on the same crime; when the defendant asserted his *Miranda* rights with respect to crime #1, he may have been unaware that he was under investigation for crime #2, or perhaps more willing to talk about his involvement in crime #2.) The supposed latent ambiguity in *Jones* is a fiction, because no reasonable jurist would distinguish *Smith* from *Jones* on the specious grounds advanced (hypothetically) by the

state. It follows that the *Jones* rule, even in light of its particular facts, is specific enough to compel *Smith*, and hence that *Smith* is not a new rule.

To sum up, we adopt the following analysis when deciding whether a case announces a new rule under *Teague*. First, we determine whether the case clearly falls in one category or another—if it overrules or significantly departs from precedent, or decides a question previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose.

III.

The Illinois Supreme Court in *Reddick* invalidated jury instructions identical in all relevant respects to those tendered at Taylor's trial. The central issue in *Reddick* was whether, in a homicide case, the defendant or the prosecution bears the burden of proving whether the defendant had a mitigating mental state when the killing occurred. The Court found that this issue was controlled by § 3-2 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., ch. 38, ¶ 3-2 (1985)). *Reddick*, 526 N.E.2d at 145. Under this provision,

> if a defendant in a murder trial presents sufficient evidence to raise issues which would reduce the charge of murder to voluntary manslaughter, then to sustain the murder conviction, the People must prove beyond a reasonable doubt that those defenses are meritless . . . .

Id. at 146. The Court declared the jury instructions defective because they placed upon the defendant the burden of proving the existence of a mitigating mental state. *Id.*

Both parties here agree that the instructions given at Taylor's trial contravene *Reddick* and that *Reddick* was

handed down after Taylor's conviction became final. They disagree as to whether we should accord Taylor the retroactive benefit of *Reddick*. Both parties assume that *Teague* governs here; Taylor maintains that *Reddick* did not announce a new rule, while the state maintains that it did. Their assumption, however, is incorrect. It is irrelevant whether the rule in *Reddick* is new or old, for it was grounded solely on Illinois criminal law, and we are foreclosed from granting habeas relief because a state court committed an error of state law. *See Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

By stating our holding in such categorical terms we do not mean to imply that the precise nature of *Reddick* (that it is based solely on state law) was always free from doubt, or even that we had no hand in creating this doubt. In *Rose v. Lane*, 910 F.2d 400, 401 n.1 (7th Cir. 1990), for example, we suggested that *Reddick* "creates a federal claim through *In re Winship*." While we subsequently characterized this statement as "somewhat unartful shorthand," *Fleming v. Huch*, 924 F.2d 679, 683 (7th Cir. 1991), some of our cases may have left the lingering impression that we still believed there was some federal constitutional content in *Reddick*. *See Falconer*, 905 F.2d at 1134 (stating that *Reddick* "obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude"); *id.* (suggesting link between *Reddick* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975)); *Rose*, 910 F.2d at 402 ("We held [in *Falconer*], following *Reddick*, that the instructions were gravely erroneous and denied the defendant due process of law."); *Fleming*, 924 F.2d at 683 (referring to petitioner's argument as a "*Falconer/Reddick* claim").

We take this opportunity to dispel any such impressions. *Reddick*, according to its own terms, was controlled by § 3-2 of the Illinois Criminal Code. The question here is whether the case was *also* controlled by the federal constitution; *Reddick* left this question unaddressed because of its grounding in state law. We find that it was not.

First, any links with the due process principles in *Falconer* are illusory. *Falconer*, as we shall see, did not rest on burden of proof questions, but rather upon the fact that the instructions were confusing and could permit a jury to completely ignore whether the defendant had a mitigating mental state—regardless of who bore the burden of proof. *Falconer*, 905 F.2d at 1136. It is thus inapposite to *Reddick*.

Nor was *Reddick* based upon due process rule underlying *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Mullaney* held that the prosecution, to garner a murder conviction, bears the burden of disproving (beyond a reasonable doubt) that the defendant possessed a mitigating mental state when he committed the homicide. It would have controlled the result in *Reddick* but for *Patterson v. New York*, 432 U.S. 197, 212-16 (1977), which limited *Mullaney* to cases where the state includes "malice" as an element of murder. In other words, only if "malice" is an element of murder does the federal due process clause require the prosecution to prove that the defendant did not act under a mitigating mental state. While this distinction seems formalistic—it may permit states to shift the burden of proof on a rather crucial issue only if it omits the term "malice aforethought" from its murder statute—it is, as both Taylor and Illinois concede, the law. *See* App. Br. at 14-16; Resp. Br. at 6.

The question, then, is whether malice was an element of murder in Illinois at the time of Taylor's conviction. It was at one point, but Illinois deleted the phrase "malice aforethought" from its murder statute when it revised the Criminal Code in 1961. Taylor, pointing to several Illinois appellate court decisions, makes a spirited argument that, the amendment notwithstanding, malice remains an element of murder. His argument, however, is doomed by the Illinois Supreme Court's subsequent decision in *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986) (malice no longer an element of murder), which we must accept as the definitive interpretation of Illinois law. *See Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

Reddick, therefore, does not rest upon federal due process principles, but rather is controlled solely by the Illinois Criminal Code (which, as it certainly may, gives criminal defendants tried in Illinois courts more breaks than it is required to by the federal due process clause). Any indications to the contrary in our prior decisions are disavowed. Taylor consequently cannot reap the benefit of *Reddick* on collateral review, for we may not grant habeas relief to remedy an error of state law. *See McGuire*, 112 S. Ct. at 480; *Pulley*, 465 U.S. at 41; *Fagan v. Washington*, 942 F.2d 1155, 1158 (7th Cir. 1991); *Cole v. Young*, 817 F.2d 412, 416 (7th Cir. 1987).

In fact, this case is markedly similar to *Engle v. Issac*, 456 U.S. 107 (1982). In 1974, the Ohio legislature enacted a statute governing the use of affirmative defenses at criminal trials. Most Ohio lower courts, including the court that convicted the habeas petitioner, had interpreted this statute to require criminal defendants to prove self-defense by a preponderance of the evidence. Subsequently, the Ohio Supreme Court in *State v. Robinson*, 351 N.E.2d 88 (Ohio 1976), construed the statute to place only the burden of production upon the defendant; once this burden was satisfied, the state was obligated to disprove self-defense beyond a reasonable doubt. *Engle* found that *Robinson* was not based upon the federal constitution; while *In re Winship*, 397 U.S. 358 (1970), and its progeny require that the state prove all elements of a crime beyond a reasonable doubt, Ohio did not make, nor did the constitution require it to make, the absence of self-defense an element of homicide. *Robinson* was thus based solely upon Ohio law, which (like the Illinois Criminal Code) granted criminal defendants greater protection than that afforded by the federal due process clause. The habeas petitioner's only claim, then, was that the jury instructions at his trial did not comply with state law. This, *Engle* held, is not a federal constitutional claim, and hence not a ground for granting habeas relief. *Engle*, 456 U.S. at 120-21 & n.21.

For the foregoing reasons, the question of whether *Reddick* constitutes a "new rule" under *Teague* is irrelevant,

for we can give the case neither retroactive nor prospective application on collateral review. One problem remains—the state arguably waived this argument by not pushing it either in the district court or on appeal. While we generally disregard waived issues, there are a narrow class of exceptions, primarily those involving "delicate issues of comity." *Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990). The rule of *Pulley* and *Engle*—which forbids federal courts in collateral proceedings from forcing state courts to remedy violations of state criminal law—certainly falls within this class, and hence we apply it despite the state's waiver.

IV.

Falconer was a habeas case in which we considered the same Illinois murder and manslaughter pattern jury instructions invalidated in *Reddick*. The two sets of instructions, we observed, were fine when read separately. *Falconer*, 905 F.2d at 1135. When read together, however, they were susceptible to more than one reasonable interpretation. One such interpretation could have left the jury "with the false impression that it could convict the petitioner of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction." *Id.* at 1136. We reasoned as follows. First, the murder instructions properly laid out the elements of murder, but did not explain that the jury could not return a murder verdict if it found that the defendant had one of the two mental states that would mitigate the homicide to manslaughter. *See id.* Second, the murder instructions preceded the voluntary manslaughter instructions. Consequently, the instructions could have allowed the jury to find that the prosecution proved both elements of murder, and to conclude that a murder verdict was appropriate, without ever reaching the issue of whether the defendant possessed a mitigating mental state. (This problem would not have arisen had the voluntary manslaughter instructions preceded the murder instructions, or had the murder instructions directed the jury to consider the

manslaughter defenses once it found both elements of murder.) We held that this violated the petitioner's due process rights and reversed his murder conviction. This Court reaffirmed *Falconer* in *Fleming v. Huch*, *supra*, and *Rose v. Lane*, *supra*.

The parties agree that the instructions given at Taylor's trial were invalid under *Falconer*. We therefore consider only whether *Falconer* announced a new rule, and, if not, whether the defective instructions were harmless beyond a reasonable doubt.[5]

A.

The state contends that *Falconer* departed from our "previously expressed views of the Illinois murder and voluntary manslaughter statutes." Resp. Br. at 10. If this is true, *Falconer* is definitely a new rule. *See* p. 7 *ante*; *Teague*, 489 U.S. at 301.

The state's strongest argument in this regard is that *Falconer* broke from *Peery v. Sielaff*, 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980), and *Bacon v. De Robertis*, 728 F.2d 874 (7th Cir.), *cert. denied*, 469 U.S. 840 (1984). Both cases (according to the state) hold that a court's refusal to tender voluntary manslaughter instructions at a homicide trial does not violate due process. If this were all *Peery* and *Bacon* held, *Falconer* would indeed be new—if we had previously held that a *complete* denial of voluntary manslaughter instructions comports with due process, a subsequent decision holding that a *constructive* denial violates due process certainly breaks from precedent. But *Peery* and *Bacon* said more:

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[5] At the outset, we note that Taylor's attorney failed to challenge the jury instructions at trial. Consequently, Taylor arguably waived the issue under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The state, however, did not push this point in the district court and does not advance it here. It has therefore "waived waiver," *Fagan*, 942 F.2d at 1157, although it is not clear whether a waiver claim would ultimately have succeeded.

a court's refusal to tender a manslaughter instruction does not violate due process *unless* the refusal would result in a "fundamental miscarriage of justice." *Bacon*, 728 F.2d at 875; *Perry*, 615 F.2d at 404. A miscarriage occurs "if *credible* evidence in the record would support a verdict based on [the omitted] instruction." *Bacon*, 728 F.2d at 875; *see also Nichols v. Gagnon*, 710 F.2d 1267, 1269 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984). Since there was no evidence that the defendants possessed a mitigating mental state in either *Peery* or *Bacon*, the courts' refusal to tender voluntary manslaughter instructions satisfied due process. In contrast, the defendant in *Falconer* presented such evidence, leading the trial judge there to tender a voluntary manslaughter instruction, albeit defective, to the jury. The facts of *Falconer*, then, took the case beyond the reach of *Perry* and *Bacon*. Consequently, it cannot be said to represent a break from those two cases.

Falconer is not the type of case that departed from precedent and hence obviously announced a new rule. Further, since there was no precedent directly on point at the time *Falconer* was decided, nor was it clearly an application of an old rule. We therefore apply the two-part analysis laid out above for difficult "new rule" cases.

B.

1.

Our first inquiry is whether lower courts or state courts had previously disagreed with the ruling we subsequently handed down in *Falconer*. The state points to *Fleming v. Gramley*, 735 F. Supp. 302 (C.D. Ill. 1990) ("*Fleming I*"), *rev'd sub nom., Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991) ("*Fleming II*"), as evidence of such a split. *Fleming I* denied habeas relief sought by a petitioner who was convicted of murder by a jury given the murder and manslaughter instructions subsequently invalidated in *Falconer*. In doing so, however, the court did not reject the due process rule underlying *Falconer*. Rather, it denied

relief on the ground that the petitioner was not entitled to a mitigation instruction because she presented insufficient evidence to support a voluntary manslaughter verdict. *Fleming I*, 735 F. Supp. at 307-08. *Fleming I* therefore implemented, albeit without citation, our decisions in *Perry* and *Bacon*, which held that due process requires the trial judge to tender manslaughter instructions (in a murder trial) only if the record contains such evidence. If, the court seemed to suggest, the petitioner was not entitled to manslaughter instructions in the first instance, she cannot complain that the instructions ultimately tendered were defective.

Fleming I never reached, even tangentially, the central issue decided in *Falconer*—what due process requires in the event a defendant presents credible evidence that *could have* supported a manslaughter verdict. (The petitioner in *Falconer* had cleared this threshold.) Seen in this light, *Fleming I* is distinguishable from *Falconer* on factual, not legal, grounds. *See id.* at 307-08. It therefore does not represent the type of frontal assault on *Falconer* which suggests prior disagreement with the precise legal issue decided therein. *See Thomas*, 910 F.2d at 1415-16.

The state also calls our attention to *People v. McGee*, 110 Ill. App. 3d 766, 443 N.E.2d 1057 (2d Dist. 1982), and *People v. Howard*, 139 Ill. App. 3d 755, 487 N.E.2d 656 (2d Dist. 1985), two cases that affirmed murder convictions returned by juries given the same instructions later invalidated in *Reddick* and *Falconer*.[6] These cases, however, were based solely on state law, *see McGee*, 443 N.E.2d at 1063-64; *Howard*, 487 N.E.2d at 660-61, and hence are not evidence of a pre-*Falconer* difference of opinion. *See* p. 8 *ante*; *Sawyer*, 110 S. Ct. at 2829-31.

We therefore find no indication that lower courts or state courts had previously split on the issue ultimately decided in *Falconer*.

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[6] While the state cites these cases to demonstrate that *Reddick* was a new rule, it is possible that they are also relevant to the novelty of *Falconer*.

2.

Our second inquiry concerns the generality of the case law underlying *Falconer*. *Falconer* considered itself an application of *Cupp v. Naughten*, 414 U.S. 141, 146 (1973), which provides that a federal court may overturn a state conviction if the "ailing" jury instructions tendered by the trial judge "so infected the entire trial that the resulting conviction violates due process." The state, however, argues that even if *Falconer* applied *Cupp*, nothing about *Cupp* dictated the result in *Falconer*. It is correct. Unlike *Falconer*, *Cupp* did not speak to circumstances where the challenged instructions were susceptible to more than one reasonable interpretation. Moreover, *Cupp* did not specify what types of infirmities would violate due process. *Cupp* is therefore too general to have compelled *Falconer* within the meaning of *Teague*. We also find, without further discussion, that the other cases cited for support in *Falconer*—including *Clark v. Jago*, 676 F.2d 1099 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984), and *Reed v. Lane*, 759 F.2d 618 (7th Cir. 1985), *cert. denied*, 475 U.S. 1054 (1986)—are either too general or too tangential to have dictated its result.

But this does not end our inquiry. In determining whether a given decision is compelled by precedent, we examine not only the precedent the decision actually cites, but also the precedent it could have cited. Self-characterization has never been considered dispositive in *Teague* new rule analysis. The simple fact that a decision, for whatever reason, fails to cite the authorities that compel it does not render it a new rule, any more than the fact that a decision describes itself as "controlled" by the authorities it cites renders it an application of an old rule. *See Butler*, 494 U.S. at 415. If a case is compelled by existing precedent, it is compelled whether it cites that precedent or not (leaving aside whether it was drafted in the most effective manner possible).

Falconer, recall, reversed petitioner's murder conviction because the jury could have interpreted the jury instructions as permitting it to return a murder verdict without first considering the defendant's manslaughter defenses. Our holding actually rested upon two premises: first, that the instructions were inherently ambiguous and susceptible to more than one interpretation; and, second, that a murder verdict reached (in accordance with one of these interpretations) without considering a defendant's manslaughter defenses violates due process. An examination of all relevant case law, particularly *Cupp*'s progeny, convinces us that there was precedent specific enough to have compelled each of these premises at the time *Falconer* was decided.

We first consider *Falconer*'s ruling that the challenged jury instructions were ambiguous and susceptible to an erroneous (we assume for the moment it was erroneous) interpretation. Prevailing law at the time *Falconer* was decided provided that, in cases challenging the sufficiency of ambiguous jury instructions, a court must view the instructions "as a whole," *Cupp*, 414 U.S. at 146-47, and ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction in" an invalid manner. *Boyde v. California*, 494 U.S. 370, 380 (1990). Was *Falconer*'s implied finding—that there was a "reasonable likelihood" that the jury applied the Illinois murder and manslaughter instructions in an erroneous manner—a new rule because no other court had addressed the question? We think not, principally because the *Boyde* rule was stated at a low enough level of generality to render *Falconer* an application of *Boyde* to a different set of facts. The rule has no latent ambiguity; there is no suggestion that it applies to some jury instructions but not to others. *Boyde* simply directs a reviewing court to assess whether, in its opinion, there is a reasonable likelihood that a certain event occurred. This is a quintessentially factual determination. To assert that *Falconer* was new, because it was the first case to assert that a particular set of instructions was ambiguous and susceptible to different interpretations, would obliterate the distinction between rules and their applications, and thereby contravene the principles of *Teague*.

Second, we consider *Falconer*'s holding that instructions permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter (in accordance with a reasonable interpretation of those instructions) violates due process. *Connecticut v. Johnson*, 460 U.S. 73 (1983), considered jury instructions that created an erroneous presumption on the element of intent. The instructions were previously invalidated in *Sandstrom v. Montana*, 442 U.S. 510 (1979), but *Johnson* elaborated on *Sandstrom*; the Court explained that the instructions were forbidden because they led the jury to ignore exculpatory evidence in finding the defendant guilty of murder beyond a reasonable doubt. *Johnson*, 460 U.S. at 84-85 (plurality opinion). We believe that this due process principle[7] is specific enough to have dictated the result in *Falconer*. Evidence of a mitigating state of mind in a homicide prosecution, while leaving a defendant guilty of manslaughter, would still exonerate as to murder. If we accept that a reasonable interpretation of the instructions in *Falconer* would have lead [sic] the jury to ignore evidence of this type, the instructions clearly contravene the principle advanced in *Johnson*.

Granted, one could conceivably argue that *Johnson* does not address the specific issue under consideration in *Falconer*, and hence does not dictate its result. *Johnson* involved instructions that lead the jury to ignore exculpatory evidence as to intent, an *element of the crime* (attempted murder) of which petitioner there was convicted.

[7] *Johnson* was a plurality opinion, but the dissent did not take issue with this particular portion of the opinion. Rather, the dissent disputed the plurality's suggestion that instructions violating *Sandstrom* warrant nearly automatic reversal, and argued instead that such errors should be subject to *Chapman* harmless error analysis. *Id.* at 94-102 (Powell, J., dissenting). The dissent's view ultimately prevailed in *Rose v. Clark*, 478 U.S. 570 (1986), and we accordingly apply harmless error analysis to the instructional error in this case.

Falconer, in contrast, involved instructions that lead the jury to ignore evidence regarding a mitigating mental state, the absence of which (in Illinois) is not an element of murder, but rather the presence of which is an *affirmative defense*. This argument, however, carves an insignificant distinction. What ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless of whether the evidence related to an element of the crime or an affirmative defense. In a state that defines manslaughter and murder as separate crimes, and at a trial where a defendant is constitutionally entitled to voluntary manslaughter instructions, a homicide committed under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill. In this light, the principle laid out in *Johnson* is indistinguishable from that applied in *Falconer*.

In accordance with the two-pronged analysis established herein, we find that *Falconer* is not a new rule, and hence that Taylor is entitled to its retroactive application.

C.

We now consider whether the erroneous jury instructions at Taylor's trial were harmless beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. 570 (1986); *Chapman v. California*, 386 U.S. 18 (1967).

The state contends that the jury, had it been constitutionally instructed, would have still (beyond a reasonable doubt) returned a murder verdict, and therefore that the error was harmless under *Chapman*. We have rejected similar contentions in the past, finding that the constitutional errors in the Illinois murder/manslaughter pattern instructions were "inherently prejudicial." *Fleming*, 924 F.2d at 683; *Rose*, 910 F.2d at 403; *Falconer*, 905 F.2d at 1137. This is particularly true in Taylor's case. Taylor admitted at trial to killing Siniscalchi; his entire defense rested upon his contention that he had acted under a sudden and intense passion and was consequently entitled to

a manslaughter verdict. *See* XIII Tr. at 126-40 (closing argument of defense counsel). The trial judge, by granting Taylor's request to tender manslaughter instructions, apparently believed that there was enough evidence in the record to support mitigation to manslaughter. *See id.* at 98-101 (colloquy on jury instructions). Had there been insufficient evidence in that regard, the judge would not have been obliged to grant Taylor's request. *See Peery*, 615 F.2d at 404. Our review of the record confirms the trial judge's belief—although there is certainly enough evidence to allow a reasonable jury to return a murder verdict as well. We therefore conclude that the error at Taylor's trial was not harmless.

* * *

We grant Taylor's petition for a writ of habeas corpus. The writ shall issue unless the State of Illinois elects to retry him within 120 days.

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 21, 1992

BEFORE: Honorable Richard A. Posner, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

No. 91-1148

KEVIN W. TAYLOR,
Petitioner-Appellant,

v.

JERRY D. GILMORE, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division
No. 90 C 1211, Judge Michael M. Mihm

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, REVERSED; Taylor's petition for a writ of habeas corpus is granted and the writ shall issue unless the State of Illinois elects to retry him within 120 days, in accordance with the opinion of this Court filed this date.

APPENDIX B

[Filed December 19, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 90-1211

UNITED STATES EX REL. KEVIN TAYLOR,

Petitioner,

v.

JERRY D. GILMORE,

Respondent.

ORDER

Before the Court is Petitioner Kevin Taylor's Petition for Habeas Corpus Relief pursuant to 28 U.S.C. §2254. Taylor asserts that the jury instructions issued by the trial court violated his constitutional right to due process. For the reasons stated below, the Petition for Habeas Corpus relief is DENIED.

BACKGROUND

Following a jury trial in the Circuit Court of Sangamon County, Taylor was convicted of murder and home invasion and sentenced to concurrent terms of 35 years and six years respectively. The facts supporting these convictions are not critical to the issues discussed herein, so they are set forth here only briefly as general background information.

On September 14, 1986, at approximately 1:00 a.m., Taylor called the home of his ex-wife Joyce Taylor to ask about their daughter Katy and about Joyce's boyfriend, Scott Siniscalchi. Joyce spoke briefly with Taylor and then hung up. A few minutes later, Taylor called back and this time Joyce's boyfriend Scott answered the phone. During a brief conversation, Scott raised his voice and told Taylor to leave Joyce alone because she needed her sleep.

A short time later, Taylor broke into Joyce's home and walked into the bedroom where Joyce and Scott had been sleeping. Taylor climbed onto the bed and, as Joyce and Scott moved away, he pulled out a knife and jumped on top of Scott. The two men struggled and Taylor stabbed Scott with the knife and killed him.

The state charged Taylor with murder and the lesser included offense of voluntary manslaughter, as well as home invasion. Taylor's position at trial was that he acted under a sudden and intense passion at the time of the killing and thus that he could only be convicted of voluntary manslaughte..

At the close of the evidence, the jury was given pattern instructions on murder followed by the following pattern instructions on voluntary manslaughter:

> To sustain the charge of voluntary manslaughter, the evidence must prove the following propositions:
>
> First: That the Defendant performed the acts which caused the death of Scot [sic] Siniscalchi, and
>
> Second: That when the Defendant did so he intended to kill or do great bodily harm to Scot [sic] Siniscalchi; or he knew that such acts would cause death or great bodily harm to Scot [sic] Siniscalchi; or he knew that such acts created a strong probability of death or great bodily harm to Scot [sic] Siniscalchi;

Third: That when the Defendant did so he acted under a sudden and intense passion, resulting from serious provocation by another.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses.

After being given these instructions, the jury returned a verdict finding Taylor guilty of murder.

On direct appeal, the Illinois Appellate Court affirmed Taylor's conviction. The Illinois Supreme Court later denied Taylor's petition for leave to appeal this decision. Taylor was equally unsuccessful in his petition for post-conviction relief at all levels of the Illinois courts.

About a year after Taylor had exhausted his direct appeals, the Illinois Supreme Court handed down its decision in *People v. Reddick*, 123 Ill.2d 184, 526 N.E.2d 141, 122 Ill.Dec. 1 (1988), which held that jury instructions such as those used in Taylor's trial constitute "grave error." The court in *Reddick* found that with these instructions a jury could find a defendant guilty of murder even though it found the presence of mitigating factors in the evidence which would support a finding of voluntary manslaughter. After *Reddick* was decided, Taylor filed this petition for

habeas relief, arguing that the jury instructions used violated his constitutional right to due process.

DISCUSSION

The state concedes that, under the current state of the law, the jury instructions used in Taylor's trial amount to a due process violation. The state notes that the Seventh Circuit has adopted *Reddick*'s view that such jury instructions on murder and voluntary manslaughter, when read together as they were at Taylor's trial, erroneously permit a jury to convict a defendant of murder even where it finds the presence of one or more mitigating circumstances. *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990). *Falconer* held that the *Reddick* decision, although not explicitly stated in such terms, was clearly predicated upon constitutional considerations of due process.

Thus, the issue of the constitutionality of the jury instructions used in Taylor's trial is not an issue before this Court—the *Reddick/Falconer* analysis holds that they are constitutionally defective and the state does not dispute this. However, the state argues other reasons why Taylor is not entitled to habeas relief despite these decisions. First, the state argues that, pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), the *Reddick* decision should not be applied retroactively to Taylor's conviction. Secondly, the state argues that even if the *Reddick* decision is applied to Taylor's conviction, any error produced by the erroneous instructions was harmless.

Teague held that a newly forged constitutional principle which was not in effect at the time that a conviction became final may not provide the basis for habeas relief. *Teague* created a "general rule" that "new constitutional rules of criminal procedure will not be applicable to those

cases which have become final before the new rules are announced." 489 U.S. at 310. The state argues that *Reddick* announced a new constitutional rule not in effect when Taylor's conviction became final, and thus is not applicable to his conviction.

Taylor was convicted on March 20, 1986. Taylor proceeded on direct review of his conviction until May 9, 1987, when the Illinois Supreme Court denied leave to appeal. If Taylor's conviction did not become final on May 9, 1987 when the Illinois Supreme Court denied leave to appeal, then it certainly became final 90 days thereafter when Taylor's period for seeking a writ of certiorari expired. *See* United States Supreme Court Rule 13; *Penry v. Lynaugh*, 109 S.Ct. 2934, 2944 (1989).

The Illinois Supreme Court's decision in *Reddick*, on the other hand, was not handed down until June 20, 1988—almost a year after Taylor's direct review had expired. Thus, the only way the *Teague* general rule will not apply (and that *Reddick* will be given retroactive application) is if *Reddick* did not announce a "new constitutional rule of criminal procedure."

In defining what constitutes a "new rule," the Supreme Court in *Teague* stated as follows:

> In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. (Citations omitted). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. (Citation omitted) (emphasis in original).

The dispositive question then becomes whether *Reddick* announced such a new constitutional principle.

Taylor asserts that *Reddick* was based upon well-established principles of constitutional law and thus should be afforded retroactive application. Plaintiff cites *People v. Flowers*, 192 Ill.App.3d 292, 548 N.E.2d 766, 139 Ill.Dec. 381 (1st Dist. 1989) in support of this argument. In that case, the Illinois Appellate Court stated as follows:

> Moreover, the rule enunciated in *Reddick* was clearly predicated upon well-settled principles of law. Consequently, although defendant's conviction was final prior to the issuance of the *Reddick* decision, we conclude that the rule of *Reddick* should be applied [retroactively] to defendant's pending collateral attack on his conviction.

139 Ill.Dec. at 384. However, the Illinois Appellate Court cited no cases substantiating its position that *Reddick* was "clearly" based upon existing law.

The state argues that *Reddick* did announce a new principle of law and thus should not be afforded retroactive application. In support of its argument, the state cites *People v. Flowers*, 138 Ill.2d 218, 561 N.E.2d 674, 149 Ill. Dec. 304 (1990), the Illinois Supreme Court's review of the Illinois Appellate Court decision above. In *Flowers*, the Illinois Supreme Court reversed the Appellate Court and held that *Reddick* did indeed announce a new constitutional rule of criminal procedure.

> We conclude that *Reddick* did constitute a new rule. Though *Reddick* was doctrinally consistent with existing laws regarding affirmative defenses and burdens of proof, it was the first time this court applied these legal principles to the specific situation of the murder and voluntary manslaughter instructions. In applying these principles, not only did the court determine that the instructions were erroneous, it also ruled that, as written, they implicated constitutional rights. This conclusion did not necessarily flow from the statutory

> analysis. (Citations omitted). Also, this "result was not dictated by precedent existing at the time." (Citations omitted). Instead, the long-standing practice in the trial courts was to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions. This court also did not invalidate these instructions in other cases it reviewed prior to *Reddick*.

149 Ill. Dec. at 313. This Court is inclined to agree with the rationale of the Illinois Supreme Court. *Reddick* outlawed jury instructions which had been firmly entrenched in the Illinois Pattern Instructions—they had not been declared erroneous prior to that decision. Similarly, when the Seventh Circuit declared that the erroneous instructions criticized in *Reddick* constituted a due process violation, it seemed to be announcing a new constitutional rule of criminal procedure. The Seventh Circuit in *Falconer* did not rest its decision upon other cases finding the same or similar jury instruction pattern to be unconstitutional.

Given that *Reddick* did announce a new rule, the only way it can be applied retroactively to Taylor's conviction is if it falls into one of the two recognized exceptions to the *Teague* general rule prohibiting retroactive application. The first exception is for new rules which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe." 489 U.S. at 307. The second exception allowing retroactive application is for a new rule which requires the observance of procedures which are "implicit in the concept of ordered liberty." *Id.* (Citations omitted).

These exceptions do not apply here. First, the *Reddick* rule did not place certain kinds of individual conduct beyond the power of the state to prescribe. As the Illinois Supreme Court stated in *Flowers*, "the conduct proscribed

in this case is murder, the prosecution of which is not prohibited by *Reddick*." Secondly, the rule announced in *Reddick* cannot be said to be a procedure implicit in the concept of ordered liberty. The phrase "implicit in the concept of ordered liberty" was borrowed from Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937). In that opinion, Justice Cardozo carved a very narrow interpretation of that concept—one which encompassed only the most cherished and most sacred of our constitutional rights. Indeed, Cardozo's examples of principles which are not implicit in the concept of ordered liberty (including trial by jury, criminal charge by indictment, and immunity from compulsory self-incrimination, 302 U.S. at 325) firmly establish that this category is reserved for overwhelmingly fundamental constitutional doctrines. This Court cannot say that the rule announced in *Reddick* and approved of in *Falconer* satisfied this criteria.

Having found that the due process standard articulated in *Reddick* and *Falconer* cannot be applied retroactively to Taylor's conviction, it is unnecessary to address the state's alternative contention that the erroneous instructions constituted harmless error. Without retroactive application of the standards in *Reddick* and *Falconer*, the instructions issued by the trial court in Taylor's trial do not amount to error and therefore a harmless error analysis is inappropriate.

CONCLUSION

Although the state concedes (and case law makes clear) that the jury instructions used in Taylor's trial constituted a violation of due process, such was not the law at the time Taylor's conviction became final. As such, those cases announcing the unconstitutionality of such jury instruc-

tions cannot provide the basis for habeas relief in this Court. Therefore, Taylor's Petition for Habeas Corpus Relief is hereby DENIED.

ENTERED this 19th day of December, 1990.

/s/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

APPENDIX C

[Filed February 2, 1987]

NO. 4-86-0355

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

KEVIN TAYLOR,
Defendant-Appellant.

Appeal from the Circuit Court, County of Sangamon.
No. 85CF536
Honorable Simon L. Friedman, Judge Presiding.

JUSTICE GREEN delivered the order of the court:

On March 20, 1986, following a jury trial in the circuit court of Sangamon County, defendant, Kevin Taylor, was convicted of the offenses of murder and home invasion. He was subsequently sentenced to terms of 35 years' and 6 years' imprisonment, respectively, to be served concurrently. On appeal, defendant maintains (1) the trial court erred in failing to amend the jury instructions on murder to reflect that the State must negate the mitigating elements of voluntary manslaughter; and (2) the trial court erred in excluding testimony concerning alleged mistreatment of defendant's daughter to show defendant acted from serious provocation. We affirm.

Joyce Taylor, defendant's ex-wife, testified at trial that (1) on September 14, 1985, she and her daughter were living with her boyfriend, Scott Siniscalchi; (2) she received two calls on that date from defendant between 1:00 and 1:30 a.m.; (3) Scott answered the second call and told defendant to leave Joyce alone; (4) a short time after the second call, she heard the front door of her apartment being kicked in, and she saw defendant walking into the bedroom; (5) defendant climbed onto the bed, pulled a knife from behind his back, and told her not to move; (6) defendant and Scott struggled; (7) Scott said "the knife [was] in [him]"; (8) Scott fell to the floor, and defendant kicked him; (9) defendant pulled the phone cord out of the wall, said "I love you" and ran out of the apartment. Joyce further testified that in January 1985, she received a telephone call from defendant in which he threatened her and Scott, and threatened to kill himself. Other witnesses testified to the events of that morning and the previous evening, and Joyce's mother testified that defendant told her, a few months prior to the stabbing, that he would "get" Scott someday.

Witnesses for the defense testified that defendant had a "good" and "close" relationship with his daughter. A defense witness was prohibited from testifying about incidents when the daughter was left at defendant's house "in a filthy condition."

Defendant testified on his own behalf that Scott had argued with defendant on occasion, and, a month prior to the stabbing had laughed at him and antagonized him. He said that when he spoke to Scott on the morning of the stabbing, Scott indicated that defendant could not see his daughter the next day. Defendant stated that he drove across town at a speed of 60 to 70 miles per hour, took a hunting knife that was in the car, and knocked on

Joyce's apartment door. He said he heard his daughter crying and kicked in the door with the intent to take her away with him. Defendant testified that he saw Scott reach for something, and he jumped on him. They struggled, and he stabbed the victim. On cross-examination, defendant admitted that Scott made him angry and hurt his pride, but he said he was not jealous. Defendant also admitted parking his car down the street from the apartment and discarding the knife and the clothes he had been wearing during the stabbing.

The trial court agreed to give voluntary manslaughter instructions, based on sudden and intense passion, tendered by defense counsel. Moreover, the court refused the State's suggestion, based on *People v. Bolden* (1985), 132 Ill. App. 3d 1047, 477 N.E.2d 1380, to modify the murder issues instruction to contain an element requiring the State to negate the mitigating element of voluntary manslaughter. Defense counsel did not tender an instruction on that issue.

In *Bolden*, this court held that "when the defendant in a murder trial introduces scme evidence of intense passion or of unreasonable belief, it is to be treated as a partial affirmative defense and the burden is on the State to negate the elements which would lead to a verdict of voluntary manslaughter." (132 Ill. App. 3d 1047, 1058, 477 N.E. 2d 1380, 1387.) In *People v. Williams* (1985), 134 Ill. App. 3d 334, 339, 480 N.E.2d 205, 209, this court stated that "*where * * * the defense requests such an instruction*" (emphasis added), the court must instruct the jury of the State's burden.

Defendant now contends that the circuit court should have followed the State's suggstion and amended the proposed issues instruction on murder to require negation

of the mitigating element. The State responds by requesting that we reconsider *Bolden* and overrule it. The State cites *People v. Wright* (1986), 111 Ill. 2d 18, 488 N.E.2d 973, as being contra to *Bolden*. The *Wright* court did not concern itself with the form of instructions to be given in regard to murder but merely considered the question of whether defense counsel should have raised the defense of voluntary manslaughter. Nothing in the opinion requires the overruling of *Bolden*. However, when the defense failed at trial to request an instruction in conformity with *Bolden*, he waived that issue.

We do not consider the failure to instruct the jury on that issue to be plain error. The plain error exception to the waiver rule created by Supreme Court Rule 451(c) (87 Ill. 2d R. 451(c)) is of a limited nature and is restricted to the correction of "grave errors" or to situations where the case is close factually and fundamental fairness requires that the jury be properly instructed. (*People v. Huckstead* (1982), 91 Ill. 2d 536, 544, 440 N.E.2d 1248, 1252.) The instant case was not factually close, and the evidence did not indicate that there existed " '[serious provocation' " sufficient " 'to excite an intense passion in a reasonable person.' " (*People v. Crews* (1967), 38 Ill. 2d 331, 335, 231 N.E.2d 451, 453.) Defendant's assertions of provocation did not arise from the decedent's acts or relationship with Joyce. (See *People v. Wax* (1966), 75 Ill. App. 2d 163, 220 N.E.2d 600.) Rather it arose from the decedent's alleged treatment of defendant's daughter. Although a voluntary manslaughter instruction was given, the evidence in support thereof was not strong.

Finally, we do not consider the trial court to have abused its discretion in excluding evidence of alleged mistreatment of defendant's daughter to show the existence of serious provocation. The alleged incidents were too re-

mote and not of a nature recognized by the courts to constitute serious provocation. (*Crews.*) We find no error in the trial court's ruling.

For the reasons stated, we affirm.

Affirmed.

SPITZ, P.J., and LUND, J., concur.

APPENDIX D

181 Ill.App.3d 538, 536 N.E.2d 1312, 130 Ill.Dec. 101

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Kevin W. TAYLOR,
Defendant-Appellant.

No. 4-88-0075.

Appellate Court of Illinois, Fourth District.

March 13, 1989.

Justice GREEN delivered the opinion of the court:

On March 20, 1986, after a jury trial in the circuit court of Sangamon County, defendant Kevin W. Taylor was convicted of murder and home invasion. Subsequently, he was sentenced to concurrent terms of 35 years' and 6 years' imprisonment, respectively. He then took a direct appeal to this court which entered an order affirming on February 2, 1987. (*People v. Taylor* (1987), 151 Ill.App.3d 1167, 113 Ill.Dec. 681, 515 N.E.2d 490 (order under Supreme Court Rule 23).) Defendant then filed a *pro se* petition under the Post-Conviction Hearing Act (Act) on February 23, 1987 (Ill.Rev.Stat. 1985, ch. 38, par. 122-1 et seq.). On December 23, 1987, the circuit court allowed the State's motion to dismiss the petition without an evidentiary hearing. Defendant has appealed. We affirm.

At trial, the circuit court granted a defense request that the jury be instructed as to voluntary manslaughter based upon sudden and intense passion. However, the court re-

jected the State's suggestion that the issues instruction in regard to murder be modified to require the State to negate the mitigating element of sudden and intense passion which would reduce the homicide to voluntary manslaughter as this court had indicated should be done in *People v. Bolden* (1985), 132 Ill.App.3d 1047, 87 Ill.Dec. 852, 477 N.E.2d 1380 (*Bolden I*). The court's failure to modify this instruction was one of the two claims of error raised on behalf of defendant on direct appeal. This court held defendant had waived any error by failing to request that the burden of proof instruction be modified.

In the instant petition for post-conviction relief, defendant asserted that he was deprived of his sixth amendment right to effective assistance of counsel because of trial counsel's failure to request the modification. Subsequent to the circuit court's decision dismissing the *pro se* petition, on June 20, 1988, the supreme court issued its decision in *People v. Reddick* (1988), 123 Ill.2d 184, 198, 122 Ill.Dec. 1, 7, 526 N.E.2d 141, 147, holding that failure of a circuit court to give the type of issues instruction which the State suggested here is "grave error" which cannot be waived. This overruled the precedent of our decision in *Bolden I*, on the direct appeal in this case, holding that such an error can be waived.

Citing *People v. Dredge* (1986), 148 Ill.App.3d 911, 102 Ill.Dec. 552, 500 N.E.2d 445, and *People v. Cowherd* (1983), 114 Ill.App.3d 894, 70 Ill.Dec. 460, 449 N.E.2d 589, defendant requests we relax the rules of *res judicata* and reconsider the propriety of our decision on direct appeal in light of *Reddick*. We need not rely upon giving *res judicata* effect to our decision on direct appeal to affirm. In a proceeding under the Act, we can only consider error which deprives of a constitutional right. In our decision rendered on this date in *People v. Bolden* (1989), 181 Ill.

App.3d 481, 130 Ill.Dec. 97, 536 N.E.2d 1308 (*Bolden II*), we have held that the *Reddick* court did not intend the "grave error" arising from the type of instructions used here to amount to constitutional error. Thus, we cannot consider any error on the part of the circuit court in giving the questioned issues instruction as to murder.

We do consider the question, raised in defendant's petition, of whether he was deprived of his constitutional right to counsel because that counsel did not request modification of the issues instruction on murder. In order to establish incompetence of trial counsel on that basis, the evidence would have to show that counsel's representation fell below a reasonable objective standard, thus depriving the defendant of a fair trial under circumstances where there was a reasonable probability that if a proper standard were followed, a different result would have been obtained. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Albanese* (1984), 104 Ill.2d 504, 85 Ill.Dec. 441, 473 N.E.2d 1246.

The evidence here was very weak that defendant acted with the "sudden and intense passion resulting from serious provocation by another" required by section 9-2(a) of the Criminal Code of 1961 (Ill.Rev.Stat. 1985, ch. 38, par. 9-2(a)) in force at the time of the alleged offense and as described in the instructions given by the court at trial. As we stated in our order of February 2, 1987, even by defendant's testimony, his passion was not sudden and the provocation was very questionable. Defendant admitted he had argued with the victim, who was defendant's estranged wife's live-in lover. Defendant stated that on the morning he stabbed the victim, he had spoken to him, and the victim had told defendant that the defendant could not see his young daughter the next day. The daughter was living with the mother and the victim. According to

defendant, he drove across town to the apartment where the child lived, at speeds of 60 to 70 miles per hour, took a hunting knife that was in his automobile, and knocked at his ex-wife's apartment. He stated he then heard his daughter crying and kicked in the door with the intent to take the child with him. Defendant testified he then saw the victim reach for something and jumped on him. According to defendant, they struggled, and he stabbed the victim.

For the stated reasons, the trial record clearly shows that a request by defendant's counsel for issues instructions conforming to *Reddick* and *Bolden I* would have been very unlikely to have resulted in defendant's homicide conviction having been voluntary manslaughter rather than murder.

Accordingly, we affirm.

AFFIRMED.

LUND and SPITZ, J.J., concur.